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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 217.

JOSEPHINE GOSS, et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

BRIEF

Of the Respondent Board of Education of the City of Knoxville, Tennessee, and the Individual Respondents in the Knoxville Case.

S. FRANK FOWLER,
Attorney for the Board of Education of the City of Knoxville, Tennessee, and Associated Knoxville Respondents.

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CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Sections 1 and 5 of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

Local school boards are authorized to take into account transitional problems of ~~public~~ stemming from race.

The transfer plan in this case, as interpreted and upheld by the Court of Appeals, reflects the assumption that in Knoxville an application for transfer based upon race is actually based upon the existence of an educational detriment or hardship due to race. The record tends to support this assumption.

Respondents believe it to be their duty, even if the challenged transfer provisions are disapproved, to grant transfers supported by good cause even though due to racial considerations.

ARGUMENT.

We are in agreement with the United States as *amicus curiae*, in whose brief it is stated:

> ". . . we fully recognize that in some communities, during the transitional period, measures for accomplishing desegregation may create individual educational problems, and that it is wise school administration to take such transitional problems of personal adjustment into account even when they originate in customs fixed by race."

(Brief for the United States as *amicus curiae*, 25.)

The petitioners agree (Petitioners' Brief, 21-2).

Respondents also agree as stated in Brief for the United States at page 18 that the provisions of Paragraph 6 of the Knoxville desegregation plan which specify race as sufficient ground for transfer are under review here only as transition measures. As such they may be entitled to approval where not so entitled if under review as permanent rules, just as, for instance, the postponement of desegration in grades not yet reached in an approved step plan is valid.

Both the Honorable Robert L. Taylor, Judge of the Federal District Court at Knoxville, and the Knoxville School Board learned early that welfare of Negroes as well as whites could be seriously jeopardized by imposing the **Brown** decisions too speedily upon the community. The Clinton disorders (R. 48), occurring in a community only eighteen miles from Knoxville, which resulted from a direction by Judge Taylor[1] to desegregate the high schools of Anderson County, Tennessee, were referred to in his

[1] *McSwain v. Co. Bd. of Ed. of Anderson Co.*, 138 F. Supp. 370 (E. D. Tenn. 1956).

opinion as revealing "pockets of hate and lawlessness" (R. 123) and giving him grave concern (R. 136). The wisdom and experience of the local authority should not be overriden in the name of equal treatment, when the feared result will be a worsened experience for both races, not only disruptive of education but creating and hardening racial animosity and destroying racial tolerance, understanding and mutual trust now undisturbed in Knoxville for fifty years.

In Knoxville only in rare instances will white parents permit their children to go to predominantly Negro schools, and the majority of Negro parents won't let their children go to predominantly white schools. Judicial commands don't change these attitudes. Forced compliance by either Negro or white would be normally regarded as harmful to the child. Overly rigorous enforcement of the **Brown** decision by the courts very likely will do more damage than under-enforcement by school boards.

Proof will undoubtedly show that through the years the Knoxville Board as a matter of course has granted transfers upon far less substantial grounds than the least of the frictions stemming from race.

When the plan of desegregation was under study in the District courtroom the main controversy was whether the grade-a-year feature was justified. The transfer provisions were merely incidental; they were valid under the holding that the **Kelley** case[2] and the challenge to them received scant attention. The proof, however, which supports a gradual desegregation also tends to support the transfer provisions. Moreover, the very fact that an application for transfer is made upon the ground of race, is some indication that actual prejudice to the pupil will follow if

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[2] *Kelley v. Bd. of Ed. of the City of Nashville*, 270 F. 2d 209 (6th Cir. 1959).

the transfer is denied. The application for transfer is tantamount to expression of the parents' opinion that the child will be at a disadvantage if not transferred and, through experience, the Board is inclined to agree. In this state of the record the Court of Appeals in effect held that inasmuch as the transfer provisions could be properly applied, they were valid but the Board was admonished not to use them as a means to perpetuate segregation (R. 162). We interpret this to prohibit transfers upon a naked ground of race. The result was to uphold the transfer provisions with leave to the plaintiffs to show specific instances of abuse, mis-use or misapplication of the provisions by the Board. The transfer plan simply reminds the transfer officers that there is an assumption that requests for transfers based upon race are supported by actual good cause which stems from race. Respondents submit that the validity of this assumption is sustained by the common knowledge that practically every departure from the segregation that has heretofore always existed in schools in communities such as Knoxville will embarrass, harm, or otherwise handicap somebody.

If, however, this Honorable Court in the absence of more specific proof in support of these provisions, should disapprove them, this action should not be a bar to a subsequent application by respondents to revive these provisions if proof then offered shows that they should be revived as a transition measure. During such period as they may be inoperative, and indeed as a permanent policy, the respondent Knoxville Board of Education feels that it will not be its duty to blind itself to such actual educational prejudice as may occur, whether to white or Negro pupils, due to inability to adjust or to be accepted by fellow pupils or other handicap. In such cases, the Board of Education will grant application for transfers where it is reasonable to expect that the applicants thereby will be helped in obtaining an education, and the Board

will do so even though the pupils' handicap is attributable to his race. This is but part of respondents' objective of providing as good an education for each child of Knoxville as they can. So far, they have preserved undisturbed classrooms and have worked out a genuine acceptance of children of both races in the same classrooms of the first four grades.

At this time the Knoxville School Board is of the opinion that it will be practicable, although it will make their duties more difficult, to delete from its plan Paragraph 6, which is the one here attacked, and utilize Paragraph 5 of this plan, which broadly authorizes transfer for "good cause" (R. 31-2) to govern all cases, including those of handicap due to race. This will compel separate investigation of each application for transfer, necessitating employment of additional personnel and expense, but can be done in this community. Whether this is practicable in other southern cities with proportionately greater Negro population is questionable. If not required of them, it should not be required of Knoxville. The retention of Paragraph 6 will greatly ease the administrative job.

For the foregoing reasons, we respectfully submit that the transfer provisions of the Knoxville plan of desegregation of the public schools should be approved and the judgment below affirmed.

S. FRANK FOWLER,
Attorney for the Board of Education of the City of Knoxville, Tennessee, and Associated Knoxville Respondents.